Supreme Court, U.S.
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No. 98-742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Petitioner,

vs.

PACIFIC INSURANCE COMPANY
and RAIL LINK, INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

GARY J. SPAHN
DABNEY J. CARR, IV
MAYS & VALENTINE
1111 East Main Street
Richmond, VA 23219
(804) 697-1200

Attorneys for Respondent Rail Link, Incorporated

SCOTT L. CAREY*
MONICA T. SULLIVAN
PETER D. LINDAU
BATES MECKLER BULGER & TILSON
8300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606
(312) 474-7900

JOHN H. OBRION, JR.
COWEN & OWEN, P.C.
1930 Huguenot Road
Richmond, VA 23235-0655
(804) 320-9100

Attorneys for Respondent Pacific Insurance Company

Counsel of Record

STATEMENT PURSUANT TO RULE 29.6

The parent of respondent Pacific Insurance Company is CNA Financial Corporation. Marine Office of America Corporation is the only nonwholly owned subsidiary of respondent Pacific Insurance Company.

The parent of respondent Rail Link, Incorporated is Genessee & Wyoming, Inc. There are no nonwholly owned subsidiaries of respondent Rail Link, Incorporated.

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STATEMENT OF THE CASE

The Petition arises from an insurance coverage declaratory judgment action governed by the substantive law of the Commonwealth of Virginia. Petitioner American National Fire Insurance Company ("American National") seeks to engage the Court in a fact-based inquiry of issues that were not properly before either the District Court or the Circuit Court, and clearly not grounds for Certiorari. Petitioner seeks to clothe this dispute in the language of Supreme Court Rule 10 by focusing on a purported "conflict" among the circuits. This argument is without merit. The Court has consistently denied this precise issue for review. Moreover, Petitioner misstates the facts and procedural history of this case. Review of this matter is not warranted because, when stripped bare, the Petitioner seeks a ruling by the Court that the District Court abused its discretion and that the Circuit Court improperly applied the proper standard of review. Certiorari should be denied under these circumstances.

A. The Petition Misstates Key Facts Underlying this Dispute.

As set forth in the Petition, this dispute arose from an accident involving an employee of respondent, Rail Link, Inc. ("Rail Link"), Christopher Womack. American National correctly states that Womack suffered injuries while performing rail-switching operations for Rail Link at a plant in Texas. American National incorrectly asserts, however, that "Rail Link created subsidiaries only for its shortline railroads, which are covered by the Federal Employers Liability Act" (Pet. at 5) and that the District Court "factually determined that FELA applied." *Id.* at 12. In truth, the record reflects that the District Court reversed its Order of July 30, 1997 (A. 33) in which it found that FELA applied to Rail Link. A. 22. Moreover, in

response to American National's Requests for Admission, Rail Link specifically denied that it created or maintained its shortline railroad subsidiaries in order to avoid liability under the Federal Employers' Liability Act. A. 8.

Womack filed suit against Rail Link seeking damages under a Texas employers' liability statute, "The Railroad Act" (the "Underlying Action"). American National did not, as it claims, attempt to assert in the Underlying Action that FELA preempted Womack's claim under the Railroad Act. There is no evidence in the record, and American National cites to none, that American National raised the issue of FELA preemption in the Underlying Action or that it requested that Rail Link assert FELA preemption as a defense to Womack's claim.[1]

At the time of the accident, Rail Link was insured by both Pacific and American National. American National provided coverage for employers' liability claims except for claims brought pursuant to FELA. American National mischaracterizes, however, the coverage provided by Pacific. Contrary to American National's assertions, the Pacific policy excluded coverage for employers' liability claims *unless* such claims were brought pursuant to FELA. A. 88-89. This was precisely the District Court's ruling in granting Pacific's Motion for Judgment on the Pleadings, which set into motion American National's circuitous and misguided efforts to introduce evidence not in the record and not relevant to the determination of coverage. American National improperly and untimely raised the FELA issue below, and continues here under the guise of Supreme Court Rule 10 to seek to circumvent Virginia law.

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1. As American National never attempted to raise the issue of FELA preemption in the Underlying Action, there was no "conflict of interest" between American National and Rail Link in the Underlying Action, as American National claims. *See* Pet. at 14.

B. The Petition Misrepresents the Procedural History of this Case.

Summarized briefly, Pacific filed this declaratory judgment action after it jointly funded a settlement of the Underlying Action with American National. As American National concedes in its Petition, "[w]hoever was found in the declaratory judgment action to provide coverage for the Womack accident would reimburse the other." Pet. at 6.

Count I of Pacific's Complaint sought a declaration that Pacific did not provide coverage for the Underlying Action, while American National did provide coverage. Pacific moved pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings as to Count I. The District Court granted the motion (A. 43-46), and then dismissed the remaining counts of the Complaint as moot. A. 42. Significantly, the Circuit Court correctly noted that American National did not argue in response to Pacific's Rule 12(c) motion that Womack's claim could have or should have been brought under FELA. A. 6.

Despite the District Court's ruling and American National's explicit understanding regarding reimbursement, American National refused to pay Pacific the liquidated damages. Pacific filed a Rule 59(e) motion, which asked the District Court to amend the judgment to reflect monetary damages consistent with the declaratory relief. A. 61. In its brief in opposition to this motion, American National claimed that FELA *could have been* a defense to the settled Underlying Action. A. 65. As the District Court eventually ruled and the Circuit Court affirmed, American National failed to assert FELA preemption as a defense to coverage until it filed its brief in opposition to Pacific's Rule 59(e) motion, after the District Court had granted Pacific judgment on the pleadings. A. 6.[2] American National

2. While American National implies that it raised the issue of FELA preemption in its answer and counterclaim (Pet. at 6, citing A. 49-52). (Cont'd)

never sought affirmative relief from the District Court on the grounds that FELA preempted Womack's Railroad Act claim. A. 6; A.13.[3]

The District Court initially veered off course and allowed briefing on the FELA issue even though it had already granted judgment to Pacific and dismissed the case. This detour culminated in an Order granting monetary relief to American National. A. 33. In the face of this clearly erroneous Order, Pacific and Rail Link each filed motions to reconsider pursuant to Rule 59(e). Pacific's motion was granted, and the Order granting relief to American National was reversed. A. 22-23. Specifically, in its Final Order, the District Court admitted that its detour was erroneous and amended its prior judgment to clarify Pacific's entitlement to monetary relief from American National. A. 24-32.

Still unwilling to pay the agreed upon liquidated damages, American National appealed. The Circuit Court affirmed, holding that the District Court did not abuse its discretion in granting Pacific's Rule 59(e) motion. *Pacific Ins. Co. v. American Nat. Ins. Co.*, 148 F.3d 396 (4th Cir. 1998). The

(Cont'd)
Neither pleading references FELA nor asserts that American National did not cover Womack's claim because FELA preempts the Railroad Act.

3. American National incorrectly implies that the Circuit Court failed to consider American National's reference to FELA at the August 15, 1996 hearing. Pet. at 16. To the contrary, the Circuit Court addressed American National's brief mention of FELA at the August 15 hearing but correctly noted that American National did not argue that FELA preempted Womack's claim under the Railroad Act. A. 6, n.1. Moreover, at the August 15, 1996 hearing, counsel for Pacific pointed out that Womack had not asserted a FELA claim in the Underlying Action. *See* A. 30.

Circuit Court also rejected American National's attempt to raise the claim of FELA preemption after the District Court had granted judgment to Pacific. A. 13-14. The Circuit Court did not, as American National claims, hold that the District Court could grant Pacific a money judgment without addressing FELA's applicability because American National did not file a Rule 59(e) motion. Pet. at 12. Rather, the Circuit Court correctly held that even if the District Court had treated American National's brief in opposition to Pacific's first Rule 59(e) motion as a motion for affirmative relief, such a motion would have been untimely. A. 13. Moreover, the Circuit Court held that American National could not raise the issue of the applicability of FELA for the first time in a Rule 59(e) motion because it had failed to raise the issue before the District Court granted judgment to Pacific. A. 13-14. As the Circuit Court held, Rule 59(e) motions may *not* be used

> to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance.

A. 11 (citing cases from the First, Fourth, Seventh and Eighth Circuits).

On November 2, 1998, American National filed its Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS TWICE DENIED WRITS OF CERTIORARI ON THIS PRECISE ISSUE, AND THIS CASE DOES NOT RAISE ANY NEW IMPORTANT MATTERS WHICH WARRANT REVIEW.

The Petition for Writ of Certiorari should be denied because this case does not raise any important matters over which the United States Courts of Appeals are in conflict. *See* Supreme Court Rule 10. Indeed, the Court has previously denied Petitions for Writ of Certiorari in two cases raising precisely the same issues raised in the petition in this case. *See Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179, 182 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009, 109 S. Ct. 793, 102 L. Ed. 2d 784 (1989); *Hidle v. Geneva Cty Bd. of Ed.*, 792 F.2d 1098, 1100 (11th Cir. 1986), *rehearing denied*, 798 F.2d 1420 (11th Cir. 1986), *cert. denied, Geneva Cty. Bd. of Ed. v. Hidle*, 479 U.S. 1088, 107 S. Ct. 1296, 94 L. Ed. 2d 152 (1987). On both occasions this Court denied certiorari despite the existence of the purported conflict.

American National does not argue any change of circumstances that makes the issue more appropriate for review now than when the Court previously denied certiorari on this issue. Rather, the conflict American National cites is an attempt to clothe the petition in the language of Supreme Court Rule 10. The Petition is, in its entirety, merely an invitation for the Court to review the District Court's decision for alleged abuse of discretion, and in turn the Circuit Court's ruling for the allegedly improper application of the proper standard of review.

II.

THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS A FACT-BASED REVIEW OF THE DECISIONS RENDERED BELOW.

The Petition states quite clearly that it seeks review by the Court on the basis of the District Court's alleged abuse of discretion and the Circuit Court's allegedly improper application of the correct standard of review. The headings preceding American National's arguments demonstrate that it seeks fact-based review of this case. As such, American National does not satisfy any of the considerations for review pursuant to Supreme Court Rule 10. Indeed, the Petition fits precisely within the last sentence of Rule 10, which states,

> [a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The District Court properly applied the substantive law of the Commonwealth of Virginia and the Circuit Court properly affirmed. American National's attempt to use Supreme Court Rule 10 to interject an issue of state law before the Court is without support. The ship sailed on American National's "FELA theory" when the Underlying Action, not brought under FELA, was settled. American National's protracted and groundless efforts to avoid its coverage obligations, as governed by Virginia law, do not justify review by the Court.

CONCLUSION

Respectfully, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SCOTT L. CAREY*
MONICA T. SULLIVAN
PETER D. LINDAU
BATES MECKLER BULGER
& TILSON
8300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606
(312) 474-7900

JOHN H. OBRION, JR.
COWEN & OWEN, P.C.
1930 Huguenot Road
Richmond, VA 23235-0655
(804) 320-9100

Attorneys for Respondent
Pacific Insurance Company

GARY J. SPAHN
DABNEY J. CARR, IV
MAYS & VALENTINE
1111 East Main Street
Richmond, VA 23219
(804) 697-1200

Attorneys for Respondent
Rail Link, Incorporated

**Counsel of Record*